DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 6567-98
8 December 1999

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 16 November 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you reenlisted in the Navy on 18 October 1993 for four years. At that time, you were serving in the rate of MS2 (E-5).

You then served in an excellent manner for almost 33 months. On 3 July 1996 the Navy Drug Laboratory reported that a urinalysis showed that you had used marijuana. Nineteen days later, you were notified of separation processing due to drug abuse. On 16 August 1996 you were evaluated by a medical officer who found that you were not dependent on drugs or alcohol.

An administrative discharge board (ADB) convened on 16 September 1996. During the ADB you testified that you did not knowingly use marijuana and said that you may have ingested it unknowingly at a party. The ADB concluded by a 2 to 1 vote that you had committed misconduct due to drug abuse and recommended that you be discharged from the Navy. The ADB unanimously recommended that you be issued a general discharge, but that it be suspended for a probationary period of 24 months.

The dissenting member at the ADB stated as follows:

> Based on the member's service record and the testimonies provided by character witnesses, the drug analysis expert in Jacksonville and the service member I was not convinced that the preponderance of the evidence supported willful misconduct in the form of drug abuse. Because of the doubt raised in my mind, I was unable in good conscience to vote for separation of the member.

On 18 September 1996 the commanding officer (CO) recommended an unsuspended general discharge. Subsequently, your counsel submitted a letter of deficiencies pointing out the lack of evidence to show knowing ingestion of marijuana. Counsel also provided excellent character references in support of the contention that you were not a drug abuser. On 25 September 1996 the discharge authority directed a general discharge by reason of misconduct. You were so discharged on 18 November 1996. At that time, you had completed almost 13 years of active service.

In your application you are requesting recharacterization of your discharge to honorable, a change in the reason for discharge, reinstatement in the Navy, and removal of all related adverse documentation from the record. In support of your application, you reiterate all of your arguments concerning the unknowing ingestion of marijuana. In addition, you contend that since you were discharged without consideration of your potential for rehabilitation, the Navy violated Department of Defense policy, set forth in 32 C.F.R. 62.4 that requires the Armed Services to treat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them. You further contend that the Navy's policy which requires separation processing for all first time drug abusers, without considering rehabilitation potential, is illegal. This policy is set forth in Naval Administrative Message (NAVADMIN) 18/92.

In reaching its decision, the Board noted that an individual cannot be rehabilitated unless he admits to drug abuse and expresses a desire to overcome the problem. Since your defense has always been that you did not knowingly use drugs, the Board believes that rehabilitation was not feasible in your case. Further, DOD Directive 1010.4 sets forth DOD policy on alcohol and drug abuse by DOD personnel. That directive is codified at 32 C.F.R. 62.4. DOD Directive 1010.4 was changed on 18 January 1996 to delete the requirement to treat and rehabilitate the maximum feasible number of drug abusers.

The Board next considered but rejected your contention that the Navy's failure to properly conduct the evaluation required by Appendix A to enclosure (7) of OPNAVINST 5350.4B warrants corrective action. In this regard, the Board noted that

paragraph 1 of enclosure (7) states that after identification of a confirmed drug or alcohol abuser, "prompt screening will determine whether the member can and should be retained." Paragraphs 1 and 2 of Appendix A to that enclosure require a written evaluation to determine the nature and extent of abuse, the individual's potential for further service, and the level of counseling or treatment needed. Paragraphs 3 and 4 of the appendix require the CO to use the foregoing evaluation in deciding whether to process the individual for separation. The appendix also states that if an individual is deemed drug dependent, processing for separation is mandatory. However, the appendix implements 10 U.S.C. 1090 by requiring that such an individual be offered treatment for the dependency prior to separation.

The Board initially noted that the record indicates that an evaluation was performed, but it did not comply with all of the foregoing requirements. However, the Board also noted that when it was issued with OPNAVINST 5350.4B in September 1990, Appendix A to enclosure (7) was clearly designed to provided a "road map" for CO's to use in deciding whether separation processing or retention was appropriate. However, the February 1992 issuance of NAVADMIN 18/92 obviated the need for such guidance since that directive mandated separation processing for all drug abusers. Accordingly, the CO did not have to decide whether to process you for separation and there was no need for an evaluation prior to such action.

The Board noted that in some cases, a favorable evaluation might be of some limited use to an individual at an ADB. However, nothing was introduced at your ADB to show that you were drug dependent. Further, as previously noted, your defense was not that you should be retained for rehabilitation, but that you were not guilty of using marijuana. The only other possible use for such an evaluation would be to offer rehabilitation prior to separation, pursuant to the appendix and 10 U.S.C. 1090, for an individual diagnosed as drug dependent. However, your denial of drug use, coupled with the lack of any other evidence of dependency, would have precluded such a diagnosis. Based on the foregoing, even assuming that the required evaluation was somewhat deficient, the Board concluded this deficiency was not prejudicial and relief is not warranted on that basis.

The Board also concluded that given the positive urinalysis, the ADB and the discharge authority could properly conclude that a preponderance of the evidence showed that you knowingly used marijuana. In this regard, there was no indication in the record of a chain-of-custody problem in the handling of your urine sample. Further, you submitted no evidence to support your claim of innocent ingestion.

Based on the foregoing, the Board concluded that the discharge was proper as issued and no change is warranted. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director